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The Sterilization Of Incompetents and the “Late Probate Court” in California: How Bad Law Makes Hard Cases

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In law, as in genetics, a mistake in conception can produce a monster. Because there is no statute expressly authorizing them to do so, for more than a decade California courts refused to authorize the sterilization of an incompetent even though such sterilization would have been in the incompetent's best interest. These holdings were based on the misconception that the Superior Court sitting in probate had only the authority expressly granted by statute, and, when so sitting, it could not exercise its general equitable authority. In 1985, when the California Supreme Court held that such sterilizations could be authorized, it did not expressly correct the jurisdictional bases of the prior holdings. Thus it is conceivable that an attempt may be made to reassert them. There are statutes allowing the courts to authorize the medical treatment of incompetents, but there are no statutes expressly allowing the withholding or withdrawal of such treatment. So the argument could be made that the treatment of incompetents must be instituted or continued even when

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there is no hope of meaningful recovery. Examination of the history of probate jurisdiction in California and demonstration of the errors that result from ignoring or suppressing that history show how the misconception arose and that it should no longer be applied.

A judicial opinion can be remarkable not only for what it says, but also for what it does not say. *Conservatorship of Valerie N.*¹ is an example. On its face *Valerie* is simply a holding that under both the federal and state constitutions, an incompetent female may not be deprived of the opportunity to be sterilized when sterilization is necessary to her "habilitation,"² and that paragraph (d) of Probate Code section 2356 "may not be invoked to deny the probate court authority to grant a conservator [or guardian] the power to consent to sterilization. . . ."³ Unless one looks beneath the surface, *Valerie* appears to be no more than the California counterpart of the relatively recent cases holding that, despite the absence of specific statutory authority, a trial court which has general equitable jurisdiction has authority to permit the sterilization of an incompetent.⁴ These cases declined to follow what had previously been considered the weight of authority that courts had no jurisdiction to authorize sterilization of an incompetent unless a positive statutory grant of authority existed. Two California cases, *Guardianship of Kemp*⁵ and *Guardianship of Tulley*,⁶ were impor-

1. 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985) (4-3 decision).

2. *Id.* at 160-61, 165, 707 P.2d at 771-72, 775, 219 Cal. Rptr. at 399, 402. The opinion uses "habilitation" to mean either or both conduct "to maximize the human potential for the developmentally disabled even though he or she may never be employable," and "freedom to pursue a fulfilling life." *Id.* at 157 n.19, 163, 165, 168, 707 P.2d at 769 n.19, 773, 775, 776, 219 Cal. Rptr. at 396 n.19, 400, 402, 404.

3. 40 Cal. 3d at 168, 707 P.2d at 777, 219 Cal. Rptr. at 404. The statute reads: "No ward or conservatee may be sterilized under the provisions of this division." CAL. PROB. CODE § 2356, ¶ (d) (West 1981). "This division" means division 4 of the Code, "Guardianship, Conservatorship, and Other Protective Proceedings."

4. *In re Guardianship of Hayes*, 93 Wash. 2d 228, 232, 608 P.2d 635, 638 (1980) is the first clear holding from a state court of last resort. See also *In re C.D.M.*, 627 P.2d 607, 611 (Alaska 1981); *P.S. by Harbin v. W.S.*, 452 N.E.2d 969, 975 (Ind. 1983); *Wentzel v. Montgomery Gen. Hosp., Inc.*, 293 Md. 685, 701-02, 447 A.2d 1244, 1252-53 (1982); *In re Moe*, 385 Mass. 555, 562, 432 N.E.2d 712, 718 (1982); *In re Grady*, 85 N.J. 235, 258-62, 426 A.2d 467, 479-81 (1981); *In re Guardianship of Eberhardy*, 102 Wis. 2d 539, 576-78, 307 N.W.2d 881, 898-99 (1981) (public policy held to make exercise of jurisdiction "inappropriate"). *Contra Anonymous v. Anonymous*, 469 So. 2d 588 (Ala. 1985); *Hudson v. Hudson*, 373 So. 2d 310 (Ala. 1979).

5. 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974).

6. *Guardianship of Tulley*, 83 Cal. App. 3d 698, 701, 704, 146 Cal. Rptr. 266, 268, 270 (1978) (jurisdiction is not to be inferred from "general principles of common law" or "the canons of equity jurisprudence").

tant, perhaps the principal, statements of the prior rule. The only reference to them in *Valerie*, however, is in a quotation from the comment of the California Law Revision Commission to its proposal of Probate Code section 2356.⁷ Thus, *Valerie* overrules *Kemp* and *Tulley* only inferentially rather than expressly.

Valerie's failure to expressly overrule *Kemp* and *Tulley* is disconcerting. As a matter of logic, invalidating the prohibition on the exercise of jurisdiction in Probate Code section 2356(d) is no more a grant of jurisdiction than disbelief of negative evidence is proof of the converse positive.⁸ But more than logical niceties were involved in *Valerie*. The court of appeal had declined to follow the more recent authorities, had adhered to the existing California position, and had held that even if Probate Code section 2356(d) was unconstitutional, the sterilization could not have been authorized because: "In California . . . jurisdiction and powers of the probate court are 'wholly statutory' [citing *Kemp*], and no statute authorizes the court to order sterilization."⁹ The California Supreme Court affirmed the denial of the conservator's petition, not on the jurisdictional grounds followed in both the trial and appellate courts, but on the ground that the record contained no evidence that sterilization was required. Noting that when a decision is correct the fact that its reasoning is wrong is irrelevant, the supreme court concluded: "The affirmance is, however, without prejudice to a renewed application for additional powers at such time as appellants have available adequate supporting evidence."¹⁰ Thus, what *Valerie* calls the "probate court"¹¹ now has jurisdiction to entertain a conservator's or guardian's petition for sterilization of a ward. This conclusion is to be inferred from, rather than expressed in or explained by, the majority opinion. Nevertheless,

7. 40 Cal. 3d at 154-55, 707 P.2d at 767, 219 Cal. Rptr. at 394.

8. Cf. *Edmonson v. State Bar*, 29 Cal. 3d 339, 343, 625 P.2d 812, 814, 172 Cal. Rptr. 899, 901 (1981). The supreme court did not refer to CAL. PROB. CODE § 2357 (West 1981) (court ordered medical treatment), let alone consider it as a basis of jurisdiction. See *infra*, text accompanying notes 176-92.

9. *Conservatorship of Nieto*, 199 Cal. Rptr. 478, 483 (1984). This was the case name in the California Reporter advance sheets. In the bound volume the case name was changed by substituting *Valerie N.* for *Nieto*. The original name is used in this paper to avoid confusing the appellate opinion with subsequent Supreme Court opinion which is also captioned *Valerie N.* Retention of the original name, *Nieto*, may be irregular, but it should do no harm as the appellate opinions can no longer be discovered except by archeological excavation. They have been removed from the ordinary channels of legal research. *Infra*, note 13.

10. 40 Cal. 3d at 169, 707 P.2d at 778, 219 Cal. Rptr. at 405.

11. *E.g.*, 40 Cal. 3d at 147, 168, 707 P.2d at 761-62, 777, 219 Cal. Rptr. at 388-89, 404.

the conclusion is not questioned in either of the dissenting opinions, which would have denied the incompetent in *Valerie* a constitutional right to have "substituted consent" to sterilization exercised on her behalf.¹²

The supreme court's silence on the jurisdiction of the "probate court" must have been deliberate, because the subject had been canvassed in the court of appeal. In an opinion, commendable not only for its content but also for its candor, the dissenting court of appeal justice in *Valerie* concluded that the state was constitutionally required to provide a forum in which a substituted choice could be made for the incompetent,¹³ and that the state had done so by giving the superior court general equitable jurisdiction over guardianships.¹⁴ But the reasons for this deliberate silence are open to conjecture.

THE DUTY TO PROVIDE A FORUM WITHIN WHICH TO EXERCISE A CONSTITUTIONAL RIGHT

In the Supreme Court the minority could have taken the established California approach and simply denied jurisdiction, but they may have been mindful of the adverse criticisms of *Kemp* and *Tulley*. These criticisms were that disposition of the case on jurisdictional grounds appeared to be an attempted "abdication of the judicial function,"¹⁵ an effort to "escape the demands of judging

12. 40 Cal. 3d at 171 (Lucas, J., dissenting), 175 (Bird, C.J., dissenting), 707 P.2d at 779, 781-82, 219 Cal. Rptr. at 406, 408-09.

13. Conservatorship of Nieto, 199 Cal. Rptr. 478, 487 (1984) (Sims, J., dissenting). Justice Sims' "commendable candor" appears from the following: "A rehearing was granted in this case to enable this writer to review material in supplemental briefs which, through inadvertence, I had not perused prior to the time I approved the majority opinion, and to give me an opportunity to reexamine the principles enunciated in that opinion." 199 Cal. Rptr. at 486.

Because the California Supreme Court granted a hearing, the opinion of the court of appeal was banished from the official reports and cannot "be cited or relied on." CAL. CIV. & CRIM. CT. R. 976 (d), 977 (a). The West Publishing Co. now participates in this obliteration. The table of cases, 191 Cal. Rptr. XXVI, lists Conservatorship of Valerie N., 191 Cal. Rptr. 283 (1983), the first appellate opinion. Between the first and second appellate opinions, the publishing company appears to have changed its practice. The table of cases, 199 Cal. Rptr. XXIII, XXV, does not list the second appellate opinion under either the name *Valerie* nor *Nieto*. West's California Digest 2d omits the two appellate opinions both from the digest proper and the table of cases. Apparently somebody is trying to show that Congressman (later President) James A. Garfield was wrong when he said: "[M]y colleague can make but he cannot unmake history." See, Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 60 n.115 (1955).

14. 199 Cal. Rptr. at 493-94. "Insofar as it [CAL PROB. CODE § 2356 (d)] may limit the jurisdiction of the probate court, it cannot prevent the superior court from asserting its general jurisdiction to enforce a constitutional right." 199 Cal. Rptr. at 499.

15. *In re Guardianship of Hayes*, 93 Wash. 2d 228, 231, 608 P.2d 635, 637 (1980).

or of making. . . . difficult appraisals,"¹⁶ or to "thwart . . . the search for a remedy to enforce a constitutional right of choice by a thicket of procedural complexities which attempts to stifle that search because of lack of a forum."¹⁷

Or the minority could have taken the approach of the Wisconsin court which embroiled itself in the paradox of recognizing that even if "the right to procreate or to prevent procreation is a protected, fundamental personal decision,"¹⁸ the court could properly refuse to enforce it because the legislature had not yet determined the state's public policy. The Wisconsin majority rationalized their inaction by analogizing it to their refusal to recognize the tort of wrongful birth.¹⁹ The California minority may have recognized and sought to avoid the error of the Wisconsin majority: failure to realize that refusing to create a new nonconstitutional cause of action *is not* analogous to refusing to enforce an existing constitutional right.²⁰ Additionally, if the California minority had wished to assert discretionary authority to refuse to exercise jurisdiction on public policy grounds, they would have had to distinguish the prior California cases holding that the existence of state jurisdiction to enforce federal rights should be exercised.²¹

Another possible, but unsatisfactory, approach might have been to argue that since no act of Congress requires state courts to enforce the federal right of personal decision to procreate or prevent procreation, the state is free to deny its courts jurisdiction to enforce that right,²² and, therefore, Probate Code section 2356 (d) is valid. Such an argument would ignore two facts: (1) despite the probate code section the courts could authorize sterilization; and (2) a remedy cannot be denied because it arises under a federal

16. *Id.* See also *In re C.D.M.*, 627 P.2d 607, 611 (Alaska 1981). *Cf. In re Guardianship of Eberhardy*, 102 Wis. 2d 539, 593, 307 N.W.2d 881, 906 (1981) (dissenting opinion).

17. *Conservatorship of Nieto*, 199 Cal. Rptr. 478, 488 (1984) (Sims, J., dissenting).

18. *In re Guardianship of Eberhardy*, 102 Wis. 2d 539, 562-63, 307 N.W.2d 881, 892 (1981).

19. 102 Wis. 2d at 576, 307 N.W.2d at 898.

20. *Cf. Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1 (1912) supporting abolition of the fellow-servant rule, making violation of a statute negligence and instituting comparative negligence by citing *Munn v. Illinois*, 94 U.S. 113, 134 (1877) ("A person has no property, no vested interest, in any rule of the common law. . . .").

21. *Brown v. Pitchess*, 13 Cal. 3d 518, 523, 531 P.2d 772, 775, 119 Cal. Rptr. 204, 207 (1975) ("[T]he existence of concurrent jurisdiction creates the duty to exercise it."); *Miller v. Municipal Court*, 22 Cal. 2d 818, 851, 142 P.2d 297, 316 (1943) ("The existence of the jurisdiction creates an implication of the duty to exercise it, and that its exercise may be onerous does not militate against that implication.").

22. *Cf. Brown v. Gerdes*, 321 U.S. 178, 189 (1944) (Frankfurter, J., concurring) ("The Constitution does not require New York to give jurisdiction to its courts against its will").

right.²³ Although the language of the Probate Code section 2356(d) is unqualified, it had not been applied to prohibit all sterilizations of wards or conservatees, but had been interpreted to allow sterilizations needed to avoid "an unreasonable risk of death."²⁴ Thus the remedy of sterilization was available in California courts without specific statutory authority,²⁵ and since the remedy was available it must be afforded to vindicate the federal right.²⁶ Denial of the remedy amounts to deprivation of a federal constitutional right of choice which deserves as good a remedy as that afforded the state or federal right of health in *Maxon v. Superior Court*.²⁷

The majority's silence on jurisdiction in *Valerie* is harder to explain. It may seem obvious that once the majority found that an incompetent had a constitutional right of procreative choice, a judicial remedy to vindicate that right must exist. This reasoning is not obvious at all, however, when viewed in the context of the tortuous history of probate jurisdiction in California.²⁸ For example, *Kemp* did hold, just as prior cases indicated, that when the superior court sits in probate "its jurisdiction and powers are wholly

23. *Id.* "[T]he state courts . . . are to act in conformity with their general principles of practice and procedure and are not to deny jurisdiction merely because the right of action arises under the act of Congress."

24. *Maxon v. Superior Court*, 135 Cal. App. 3d 626, 634, 185 Cal. Rptr. 516, 521 (1982).

25. *Maxon* summarized *Kemp* as holding: "that the superior court sitting as a probate court was a court of limited jurisdiction and that, in the absence of statutory authority, it lacked jurisdiction to order the involuntary sterilization of a severely impaired ward." 135 Cal. App. 3d at 633, 185 Cal. Rptr. at 520. Without contradicting this, *Maxon* proceeded to hold there was authority to authorize sterilization without explaining the source of the authority, thereby anticipating the similar silence in *Valerie*.

26. *Martinez v. California*, 444 U.S. 277, 284 n.7 (1980). The *Martinez* court stated: "[W]here the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim." See also *Testa v. Katt*, 330 U.S. 386, 390, 391, 392 (1947) ("power and duty" of state courts to enforce federal laws). Cf. *Broderick v. Rosner*, 294 U.S. 629, 642-43 (1935) (a state may not "under the guise of merely affecting the remedy, deny enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject-matter and the parties").

27. Cf. *Williams v. Horvath*, 16 Cal. 3d 834, 840, 548 P.2d 1125, 1129, 129 Cal. Rptr. 453, 457 (1976) (citing *Monroe v. Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring)); *Modern Barber Col. v. California Emp. Stab. Comm'n*, 31 Cal. 2d 720, 728, 192 P.2d 916 (1948) ("[I]f the right to be vindicated is one granted by the Constitution, an injunction may be granted regardless of the statute if injunction is an appropriate remedy, because the right is one which the Legislature cannot abridge").

28. It was certainly not obvious in 1984. Consider the following:

Tulley and *Kemp* [hold] that the law of California does *not* vest a probate court with jurisdiction to authorize or order sterilization. We may therefore follow *Tulley* and *Kemp* in the present case, and affirm the order under review, without regard to appellants' constitutional challenge of the statute [CAL PROB. CODE § 2356, ¶ (d) (West 1981)].

Conservatorship of Nieto, 199 Cal. Rptr. 478, 482 (1984).

statutory.”²⁹ But *Kemp* went further and held “[t]he probate court has exclusive jurisdiction of guardianship proceedings,”³⁰ a proposition that *Kemp* and later cases applied to prevent the superior court from exercising equitable powers on behalf of an incompetent.³¹

A SHORT HISTORY OF THE PROBATE COURT IN CALIFORNIA

Although the words and application of the above proposition seem sensible, in fact they were and are so wrong that it is hard to decide where to attack them first. For sake of simplicity, view *Kemp* and its progeny as a syllogism:

The probate court has jurisdiction of guardianships.

The jurisdiction of the probate court is exclusive.

Therefore the superior court can exercise no authority in a guardianship.

There has not been a probate court as such in California for more than a century. The probate court is gone,³² and has been gone since 1879.³³ As early as 1881 the probate court was funereally described as “the late Probate Court.”³⁴ Nevertheless, the expression “probate court” has persisted in California cases and other legal writing since 1879. “But no harm is done where it is understood that such reference is to the superior court sitting in the exercise of its probate jurisdiction,” says the court in *Schlyen v. Schlyen*.³⁵ The corollary, of course, is that harm is done if the

29. *Guardianship of Kemp*, 43 Cal. App. 3d 760, 761, 118 Cal. Rptr. 64, 66 (1974); *Maxon v. Superior Court*, 135 Cal. App. 3d 626, 633, 185 Cal. Rptr. 516, 520 (1982); *Conservatorship of Nieto*, 199 Cal. Rptr. 478, 481, 483 (1984).

30. 43 Cal. App. 3d at 761, 118 Cal. Rptr. at 66.

31. *Guardianship of Tulley*, 83 Cal. App. 3d 698, 705, 146 Cal. Rptr. 266, 270 (1978).

[A]ppellant’s argument [that the superior court had “equity power to serve and promote the interest and welfare of the incompetent”] must fail for the reason that the purported invocation of the equity power of the superior court must be deemed null and void. It is well established that the probate court has exclusive jurisdiction of guardianship proceedings. . . .

Conservatorship of Nieto, 199 Cal. Rptr. 478, 483 (1984) (authority can not be derived from state constitution or inherent equitable powers because “jurisdiction and powers of the probate court are ‘wholly statutory’ . . .”).

32. *Estate of Davis*, 136 Cal. 590, 597, 69 P. 412, 414 (1902).

33. *Schlyen v. Schlyen*, 43 Cal. 2d 361, 369-72, 273 P.2d 897, 900-03 (1954) (historical account); *Estate of Davis*, 136 Cal. 590, 597, 69 P. 412, 414 (1902) (“[T]here is no probate court in the sense that the term has been used in the earlier volumes of the California reports”); see also R. POUND, *ORGANIZATION OF COURTS* 178 (1940).

34. *Theller v. Such*, 57 Cal. 447, 450 (1881).

35. 43 Cal. 2d at 375, 273 P.2d at 904; 11 CAL. JUR. *Executors and Administrators* § 26, at 240-41 nn.17-18 (1923) (acknowledging but following erroneous custom and practice of referring to “probate court” and “probate judge”).

expression "probate court" is given its literal meaning. Despite its citation of *Schlyen*,³⁶ giving "probate court" unsupported and unsupported significance is exactly what *Kemp* did. On the basis of *Schlyen* the major premise of the *Kemp* syllogism can be restated: The superior court sitting in probate has jurisdiction of guardianships.

Neither the source nor the significance of the qualification, "sitting in probate," are immediately apparent. Since 1880, and 1974 when *Kemp* was decided, and to this day, the statutes have provided only that guardianships and, more recently, conservatorships are within the jurisdiction of the "superior court."³⁷ No statutory basis for *Kemp's* expression "sitting in probate"³⁸ has been found. But for many years guardianships had been generally regarded as probate proceedings because the statutes relative to guardianships were "embraced within the same title [of the Code of Civil Procedure] as relates to proceedings in estates of decedents."³⁹ The court, however, recognized that, because of the need to protect a ward,⁴⁰ the analogy between estates and trusts on the one hand and guardianships on the other should not be pressed too far.⁴¹ In

36. 43 Cal. App. 3d at 761, 118 Cal. Rptr. at 66.

37. 1880 Cal. Amendment to the Codes, Code of Civil Procedure, ch. 74, at 65, § 1747 (minors), at 67, § 1763 (incompetents), superseded in 1931 by CAL. PROB. CODE § 1405, (enacted by 1931 Cal. Stat. ch. 281, at 670) (both minors and incompetents). As amended by 1959 Cal. Stat. ch. 1459, at 3753, the version effective at the time of *Kemp*, § 1405 still read substantially as its predecessors: "The superior court shall appoint a general guardian of the person . . . of minors and insane or incompetent persons. . . ." Now CAL. PROB. CODE § 2200 (West 1981): "The superior court has jurisdiction of guardianship and conservatorship proceedings."

38. 43 Cal. App. 3d at 761, 118 Cal. Rptr. at 66.

39. Estate of Dunphy, 158 Cal. 1, 3, 109 P. 627, (1910) (prematurity of appeal in guardianship determined by reference to statutes relative to decedents' estates rather than those relative to civil actions because of former Code of Civil Procedure § 1808 (now CAL. PROB. CODE § 2100 (West 1981)), although "[n]o valid reason can be urged" for the difference), 158 Cal. at 5, 109 P. at 629. See *infra*, note 96.

Dunphy's reference to the title in the Code of Civil Procedure illustrates one reason for persistence of the expressions "probate court" and "probate judge." As enacted in 1872, when there were Probate Courts and Probate Judges, Part III, Title XI of the Code of Civil Procedure read "Of Proceedings in Probate Courts." But when the operative sections of the code were amended in 1880 to reflect the changes effected by the Constitution of 1879, *supra*, note 37, the title was not altered. Indeed, the title referring to the nonexistent courts survived the removal of the operative section from the Code of Civil Procedure to the Probate Code. See CAL. CIV. PROC. CODE (Deering 1931) at 680. Perhaps to celebrate the centennial of its substantive, if not literal, demise, the title was finally repealed in 1979. 1979 Cal. Stat. ch. 373, §§ 556-606, at 1426-28.

40. Guardianship of DiCarlo, 3 Cal. 2d 225, 235, 44 P.2d 562, 567 (1935). The court defined a ward as: "a person under legal disability and ordinarily unable to protect himself against overreaching or other improper conduct of the guardian . . ." *Id.*

41. Guardianship of DiCarlo, 3 Cal. 2d 225, 234-35, 44 P.2d 562, 566-67 (1935) (unlike intermediate or current accounts of executors or trustees, those of guardians are not res

1974 a rule of the Judicial Council did require the presiding judge of the superior court in the larger counties "to designate one or more departments to conduct the proceedings in . . . probate cases."⁴² The Council's old rules that, in certain counties, guardianships and probate proceedings should be assigned to the same departments⁴³ had been long superseded. Various local rules provide, as they have for many years, that guardianships and conservatorships are assigned to probate departments.⁴⁴ These rules, however, concern only the distribution of business within the court and have no jurisdictional significance except in situations involving a judge in one department improperly interfering in a matter assigned to another department, or attempting to exercise jurisdiction outside the scope of the pending proceeding.⁴⁵

The identification of guardianships with probate matters is explained by history rather than logic. The original California constitution of 1849 followed a then common pattern of providing a separate probate jurisdiction.⁴⁶ This device was designed to eliminate the traditional distinctions among the ecclesiastical, common-law, and chancery jurisdictions and provide a readily accessible forum to handle what are largely administrative matters.⁴⁷ The first legislature also followed this pattern, and appended guardianships

judicata despite approval by the "probate court"). *Compare In re Bundy*, 44 Cal. App. 466, 467-68, 186 P. 811, 812 (1919) (applicant for letters of guardianship allowed attorney's fee because acting in interest of ward).

42. CAL. CIV. & CRIM. CT. R. 247 (West 1981) (repealed 1985). See now *id.* 214 (West Supp. 1986): "Except as otherwise provided by law, the business of the [superior] court shall be distributed by the presiding judge."

43. E.g., SUPER. CT. R., XXII, XXIV, ¶ 8, 204 Cal. lxxviii, lxxxii (1929).

44. E.g., Los Angeles County Probate Policy Memorandum, § 18 (guardianships), § 19 (conservatorships), and San Francisco Probate Manual 1.03, 12.01-12.06. The local rules are collected in CAL. CONTINUING ED. OF THE BAR *California Local Probate Rules* (7th ed. 1986).

45. 2 B. WITKIN, CALIFORNIA PROCEDURE, *Courts*, §§ 184-89 (3d ed. 1985). The proposition is no novelty. The authorities cited antedate *Kemp* by at least several years. Note the following: "Where, by statute, a distinct subject matter jurisdiction has been given to a *special department* or 'court,' e.g., Probate . . .," *id.* § 185, at 209; and "The Probate Court . . . exercise[s] a special statutory jurisdiction. . .," *id.* at 210. Despite these statements, Witkin cites no statute referring to the probate department, and the writer has found none. The probate department or court exists only by virtue of rules adopted for convenience in the distribution and handling of the superior court's business. *Schylen v. Schylen*, 43 Cal. 2d 361, 370-72, 273 P.2d 897, 901-03 (1954).

46. CAL. CONST. OF 1849, art. VI, § 8 ("He [the County Judge] shall . . . perform the duties of Surrogate, or Probate Judge."). Simes & Basye, *The Organization of the Probate Court in America* (pt. 1), 42 MICH. L. REV. 65, 977-82 (1944).

47. R. POUND, ORGANIZATION OF COURTS 140, 179 (1940); Simes & Basye, *supra* note 46, 42 MICH. L. REV. at 976.

of both infants and other incompetents to the probate jurisdiction.⁴⁸ Traditionally, "[g]uardianship was in the jurisdiction of chancery over infants, lunatics and idiots,"⁴⁹ and its addition to probate jurisdiction was recognized as an innovation which did not oust the old District Court of its equitable powers over guardianships.⁵⁰

Unlike chancery, however, the old Probate Court was an "inferior court" which could not take jurisdiction or administer remedies unless provided by statute.⁵¹ At first the Probate Court may have been inferior in fact⁵² as well as in the legal hierarchy. The old District Courts had unlimited jurisdiction in all issues of fact joined in the probate courts,⁵³ a situation once described as leaving the Probate Courts "as the mere registers of the decisions of the District Courts."⁵⁴ Because of their inferior status, Probate Courts were not courts of record and their proceedings were not entitled to the ordinary presumptions of jurisdiction. As a result, "no business depending on letters testamentary or of administration could be safely transacted."⁵⁵ This rule was found intolerable.⁵⁶ It was abolished in 1858 by an act to give to the proceedings of courts of probate the same effect as courts of general jurisdiction, and in 1862 the constitution was amended to conform to the act.⁵⁷ These steps, however, "still left the probate court a separate and special tribunal which did not have full probate jurisdiction,"⁵⁸ because the constitution provided that the Probate Judges should

48. 1850 Cal. Stat. ch. 115, §§ 23, 24, 35; 1851 Cal. Stat. ch. 1, §§ 78, 81. R. POUND, *supra* note 47, at 136; Simes & Basye, *supra* note 46, 42 MICH. L. REV. at 980; *id.* (pt. 2), 43 MICH. L. REV. 113, 131-32 (1944).

49. R. POUND, *supra* note 47, at 136; Simes & Basye, *supra* note 46 (pt. 2).

50. *Wilson v. Roach*, 4 Cal. 362 (1854):

The District Courts of this State have the same control over the persons of minors, as well as their estates, that the Courts of Chancery in England possess. This jurisdiction is conferred by the Constitution, and cannot be divested by any legislative enactment. . . . The claim of exclusive original jurisdiction in the Courts of Probate over this subject is unfounded. Chancery may at any time interfere, and remove the proceedings before it.

Id. at 366-67. See also *Robinson v. Fair*, 128 U.S. 53, 86 (1888); *In re Vedder*, 1 Labatt 246 (Cal. Dist. Ct. 1857). But see *Toland v. Earl*, 129 Cal. 148, 153-54, 61 P. 914, 915 (1900) (after the superior court had both probate and equity jurisdiction).

51. *Grimes Estate v. Norris*, 6 Cal. 621, 622 (1856).

52. R. POUND, *supra* note 47, at 140, 179.

53. See CAL. CONST. of 1849, art. VI, § 6 (1862).

54. *In re Will of Bowen*, 34 Cal. 682, 689 (1868).

55. *Irwin v. Schriber*, 18 Cal. 499, 504 (1861).

56. *Burris v. Kennedy*, 108 Cal. 331, 337-38, 41 P. 458, 459 (1895).

57. 1858 Cal. Stat. ch. 120, at 95; later acknowledged *sub silentio* in CAL. CONST. OF 1849, art VI, § 6 (1862), which deleted the clause giving the District Courts jurisdiction over matters of fact joined in the Probate Courts.

58. *Burris v. Kennedy*, 108 Cal. 331, 338, 41 P. 458, 459 (1895).

perform only duties prescribed by law—no law, no duty or authority.⁵⁹

THE EQUITABLE AND INCIDENTAL AUTHORITY OF THE SUPERIOR COURT IN PROBATE AND GUARDIANSHIP MATTERS

The dictum, “[i]n the constitution of 1879 all this was changed,”⁶⁰ was unduly sanguine. Granted, in 1879 the Probate Court as such was abolished and the Superior Court was given “original jurisdiction in all cases in equity . . . [and] of all matters of probate.”⁶¹ Since this gave probate jurisdiction to the highest court in the state having general common-law jurisdiction, it scotched any remnant of the notion that probate decrees were particularly vulnerable to collateral attack.⁶² But because of the constitutional separation between probate and other jurisdictions of the Superior Court, the pre-1879 limitation that the former Probate Court could not “take jurisdiction or administer remedies other than those given, and in the manner provided by statute”⁶³ remained almost intact and was applied to probate matters in the Superior Court.⁶⁴ For example, the old Probate Court had no statutory authority to cite the administrator of a deceased administrator to settle the account of the deceased in the estate for which he was responsible. But the new administrator of the estate was not without remedies; an action in equity against the administrator of the deceased administrator was

59. CAL. CONST. OF 1849, art. VI, § 8 (1862); *Bush v. Lindsay*, 44 Cal. 121, 125 (1872).

60. *Burris v. Kennedy*, 108 Cal. 331, 338, 41 P. 458, 459 (1895).

61. CAL. CONST. art. VI, § 6 (1879), now § 10 as amended in 1966 (“superior courts have original jurisdiction in all causes except those given by statute to other trial courts.”).

62. *Burris v. Kennedy*, 108 Cal. 331, 338, 41 P. 458, 459 (1895) (“The same presumption must now attach to decrees in probate proceedings upon collateral attack as to judgments in cases at common law or in equity. . .”).

63. *Grimes Estate v. Norris*, 6 Cal. 621, 622 (1856). See *supra* note 51.

64. *Estate of Davis*, 136 Cal. 590, 597, 69 P. 412, 414-15 (1902):

It may be said that the probate court is gone, but that the probate jurisdiction remains. . . . Yet the probate jurisdiction of the superior court is different from its law and equity jurisdiction in this—it is essentially a jurisdiction under the control of the state legislature. That law making power may enlarge it or may restrict it [and]. . . . the procedure by which that jurisdiction may be invoked. . . .

Id.

One advance was that if the court had jurisdiction over the subject matter and over the person, a matter improperly brought in probate could be treated as a proceeding in equity, because “the same tribunal exercises equity and probate jurisdiction.” *In re Thompson*, 101 Cal. 349, 354, 35 P. 991, 992, *modified*, 36 P. 98, 508 (1894). See also *Guardianship of Wells*, 140 Cal. 349, 352, 73 P. 1065, 1066 (1903). But this rule was not applied in *Davis* because the defendants came into court only in “answer to a citation, a process entirely unlike a summons, . . . [and] by their appearance, defendants did not submit themselves to the jurisdiction of a court of equity, but alone to the jurisdiction of the superior court in a matter of probate.” 136 Cal. at 598, 69 P. at 415.

available.⁶⁵ Despite the constitutional changes of 1879, this cumbersome procedural necessity survived until 1905 when a statute provided that the executor or administrator of a deceased executor or administrator could present accounts "to the court" (more properly in the proceeding) in which the estate was being administered. This statute transformed the equity proceeding from a necessity to an impropriety because an adequate remedy now existed, and "the foundation of the equity jurisdiction [was] gone."⁶⁶

A continuing example of the need to resort to an equity proceeding in probate affairs is seen when a final decree in a probate proceeding is attacked for extrinsic fraud. Such an attack cannot be made by motion in the probate proceeding unless it appears on the face of the judgment roll that the court had no jurisdiction. Of course, the alleged fraud will not usually be so apparent. Therefore, if a final decree in probate was procured by extrinsic fraud, the facts must be shown by a separate suit in equity.⁶⁷ The genesis of this requirement is stated as follows:

[T]he jurisdiction . . . to distribute the assets of an estate is vested exclusively in the probate court, under proceedings *in rem*, strictly defined by statute. It is a matter of gravest doubt, therefore, whether it is within the power of a court of equity in this state to set aside a decree of distribution so given by a court having exclusive jurisdiction of the matter.⁶⁸

The courts of equity therefore devised the remedy of a suit *in personam* against the beneficiary of the fraud to impose a constructive trust on him, thus preserving the "exclusive jurisdiction" of the probate court by leaving the probate decree intact and protecting those who had relied on it in good faith.⁶⁹

Concurrently with the restrictions created by the principle that in probate proceedings the superior court was still a separate and special tribunal which did not have full probate jurisdiction,⁷⁰ there emerged what on its face may seem to be a contradictory concept. Since California no longer has a distinct probate court, and

65. *Bush v. Lindsey*, 44 Cal. 121, 124-25 (1872).

66. *King v. Chase*, 159 Cal. 420, 422-24, 115 P. 207, 208-09 (1911). No distinction between deceased executors and administrators on the one hand, and deceased guardians on the other, has been found. *Cf. Zurfluh v. Smith*, 135 Cal. 644, 67 P. 1089 (1902).

67. *Security-First Nat'l Bank v. Superior Court*, 1 Cal. 2d 749, 757-58, 37 P.2d 69, 73 (1934); *Estate of Davis*, 151 Cal. 318, 327, 86 P. 183, 186, *reh'g denied*, 90 P. 711 (1907).

68. *Sohler v. Sohler*, 135 Cal. 323, 328, 67 P. 282, 284 (1902).

69. *Id.* at 329-30, 67 P. at 285 (based on the English Chancery practice relative to decrees of the ecclesiastical courts).

70. *Cf. Burris v. Kennedy*, 108 Cal. 331, 337-38, 41 P. 458, 459 (1895). *Supra* note 58.

superior courts have both probate and equity jurisdiction . . . whenever in the course of administration and settlement of estates, our probate statutes are found to be inadequate to authorize and accomplish all that a court of equity is authorized to do in such cases, our superior courts may exercise their equity powers in connection with and as incidental to their power in probate matters to the extent necessary to a complete administration and distribution of estates; provided, of course, nothing be done in contravention of any statutory provision.⁷¹

This principle emerged from unsuccessful attacks on the constitutionality of statutes expanding the probate jurisdiction by defining as "probate matters" cases that had previously been equitable.⁷² And the doctrine was extended by following the common-sense proposition that "[a]ny contrary doctrine would permit the probate court to be shorn of all power except what was directly conferred upon it in the very words of the statutes."⁷³ Thus *Estate of Bell* held that even though "the superior court sitting in probate is limited in its jurisdiction," and despite the absence of specific statutory authority, an executrix in a probate proceeding could defend against a creditor's claim by asserting a defense of setoff.⁷⁴ And although no statute provided for the procedure, the court in probate could order the distributee to restore property erroneously distributed to her to the executors.⁷⁵ The power to make such an order was "inherent in the court" even if the court was one of limited jurisdiction.⁷⁶

The concepts of inherent powers and equitable powers were conjoined in *Estate of Charters*.⁷⁷ A trustee who had also been a ward's guardian and had filed nine accounts in the guardianship petitioned for instructions. The ward then contested the guardian's third account on the ground that the guardian previously had a conflict of interest with the ward which denied the ward effective

71. *Verdier v. Roach*, 96 Cal. 467, 478, 31 P. 554, 557-58 (1892); *In re Burton*, 93 Cal. 459, 463-64, 29 P. 36, 37 (1892).

72. *Cf. In re Burton*, 93 Cal. 459, 462-63, 29 P. 36, 37 (1892) (former grant of equity jurisdiction to superior court, *see supra* text accompanying note 61, not violated by statute requiring settlement of claims of assignees of heirs in the probate proceeding); *Verdier v. Roach*, 96 Cal. 467, 479, 31 P. 554, 558 (1892) (contingent claims, formerly protected in equity, barred if not presented in probate proceeding within statutory period).

73. *Estate of Johnson*, 4 Coffey Probate Decisions 499, 506 (Cal. Super. Ct. 1895).

74. *Estate of Bell*, 168 Cal. 253, 257, 141 P. 1179, 1180-81 (1914). The Court suggested that the executrix could have asserted the setoff by intervention in the insolvency proceeding in the superior court against the creditor. 168 Cal. at 258, 141 P. at 1181.

75. *Heydenfeldt v. Superior Court*, 117 Cal. 348, 351, 49 P. 210, 211 (1897).

76. *Id.*

77. 46 Cal. 2d 227, 293 P.2d 237 (1956).

representation.⁷⁸ The court allowed the attack on the grounds that since the probate court by statute had continuing jurisdiction over the trust,⁷⁹ the superior court sitting in probate "could bring to its aid the full equitable and legal powers with which as a superior court it is invested."⁸⁰ Additionally, since the third account was not *res judicata* against the ward, the court applied the general rule: "A court has inherent power to set aside a decree for extrinsic fraud when a party has been prevented from fully presenting his case and there had therefore been no adversary trial of the issue."⁸¹

But, since the meaning of "incidental" is less than precise, the court in *McPike v. Superior Court*⁸² held that a statute which permitted the superior court in probate to authorize an administrator to compromise a claim against an estate did not give the court authority to compel the administrator to carry out the provisions of the compromise. Although the court referred to the generality that a court in probate "has no other powers than those given by statute and such incidental powers as pertain to it," it relied equally on a comparison of mandatory and permissive probate provisions, and on the traditional reluctance to infer probate jurisdiction "to try purely collateral matters with strangers."⁸³

There are occasional references to the "exclusive jurisdiction" of the probate court.⁸⁴ These references are as evanescent as those relative to the jurisdiction of the probate court in general and "appear to be an overstatement."⁸⁵ Of course, if the probate proceeding provides a remedy that has no common law or traditional equity counterpart, the probate jurisdiction is perforce exclusive.⁸⁶ If the probate proceeding provides an adequate remedy in lieu of

78. 46 Cal. 2d at 234, 236, 293 P.2d at 782-84. See *Guardianship of DiCarlo*, 3 Cal. 2d 225, 234-35, 44 P.2d 562, 566-67 (1935) (guardian's current accounts not *res judicata*).

79. CAL. PROB. CODE § 1120 (West 1981).

80. 46 Cal. 2d at 236, 293 P.2d at 783.

81. 46 Cal. 2d at 234, 293 P.2d at 783. On the difference between *Charters* and *Security-First Nat'l Bank v. Superior Court*, 1 Cal. 2d 749, 37 P.2d 69 (1934), see *Neubrand v. Superior Court*, 9 Cal. App. 3d 311, 322-23, 88 Cal. Rptr. 586, 593 (1970) (final orders may not be attacked by motion in probate proceeding). But see *Estate of Auslender*, 53 Cal. 2d 615, 626 n.1, 349 P.2d 537, 542 n.1, 2 Cal. Rptr. 769, 774 n.1 (1960): "[I]nsofar as that case [*Security-First*] holds that a probate court cannot set aside its prior order, which order has become final, on the ground of extrinsic fraud, it appears to have been impliedly overruled by *Estate of Charters*. . . ."

82. 220 Cal. 254, 30 P.2d 17 (1934).

83. *McPike v. Superior Court*, 220 Cal. 254, 258-59, 30 P.2d 17, 18 (1934).

84. E.g., *Sohler v. Sohler*, 135 Cal. 323, 328-29, 67 P. 282, 284 (1902); *Schlyen v. Schlyen*, 43 Cal. 2d 361, 366, 373, 273 P.2d 897, 898, 904 (1954) (argument).

85. 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills & Probate* § 235 (7th ed. 1974).

86. *Smith v. Westerfield*, 88 Cal. 374, 379, 26 P. 206, 207 (1891) (determination of heirship).

a former equitable remedy the probate jurisdiction becomes exclusive because, on general principles, there is no need to resort to equity.⁸⁷ Of course, the rules of territorial comity apply, so that the superior court of one county may not interfere by a probate proceeding or otherwise in a proceeding already pending in another county.⁸⁸ Despite the generalization as to exclusivity, there are instances where a superior court sitting in probate may have concurrent jurisdiction with itself sitting in some other capacity.⁸⁹ In *Schlyen v. Schlyen*,⁹⁰ before a will contest was brought to trial, the contestants filed an action against the executrix alleging she had defrauded the decedent. The court enforced a stipulation consolidating the probate and equity matters for trial and allowed them to proceed simultaneously because in such a case the probate "jurisdiction is not exclusive, depending on the facts of the particular case and may be waived."⁹¹ Since the issue is jurisdiction over the subject matter and the court can have jurisdiction over the same subject matter in two capacities, the consolidation of the proceedings is not merely a matter of agreement by the parties, but may also be ordered by the court.⁹²

What emerges from these cases is a general principle that if the probate procedure does provide a remedy to vindicate an asserted right, the probate procedure is exclusive because no other procedure need be invoked. If the probate procedure does not provide a remedy, the right may be vindicated by another procedure, which, if need be, may proceed concurrently with the probate matter before the same judge. Except in the case where the probate procedure is provided to vindicate a right unknown to the common law or equity, the absence of a probate remedy does not indicate absence of a right.

87. *King v. Chase*, 159 Cal. 420, 424, 115 P. 207, 209 (1911); *Turney v. Shattuck*, 96 Cal. App. 590, 593, 274 P. 442, 444 (1920). The time and procedural restrictions of the new remedy cannot be evaded by purporting to bring a suit in equity. *Fisher v. Superior Court*, 23 Cal. App. 2d 528, 531, 73 P.2d 892, 894-95 (1937) (the statute allowing contest of a will after probate "is both a statute conferring jurisdiction and a statute of repose"). Cf. *Toland v. Earl*, 129 Cal. 148, 153, 61 P. 914, 915 (1900).

88. *Dungan v. Superior Court*, 149 Cal. 98, 100-01, 84 P. 767, 768-69 (1906) ("When any such [probate] court has acquired jurisdiction, that jurisdiction is exclusive"); *Browne v. Superior Court*, 16 Cal. 2d 593, 597, 107 P.2d 1, 3 (1940) (superior court may not by *habeas corpus* interfere with guardianship pending in another county).

89. *Estate of Bell*, 168 Cal. 253, 258, 114 P. 1178, 1181 (1914) (insolvency); *Schlyen v. Schlyen*, 43 Cal. 2d 361, 378, 273 P.2d 897, 906 (1954) (equity).

90. 43 Cal. 2d 361, 273 P.2d 897 (1954).

91. *Schlyen v. Schlyen*, 43 Cal. 2d 361, 378, 273 P.2d 897, 906 (1954).

92. *Neubrand v. Superior Court*, 9 Cal. App. 3d 311, 322-23, 88 Cal. Rptr. 586, 593 (1970).

The general principles are as applicable to guardianships as they are to decedents' estates. Such statements as "[guardianship] proceedings in this state . . . are in probate,"⁹³ and "in this state . . . probate proceedings are special in their nature and purely statutory in their origin,"⁹⁴ should not be read as limitations on the substantive rights of wards or conservatees. If read in the context in which they were made—that in the absence of specific provisions relative to guardianships and conservatorships, the provisions of the Probate Code applicable to the administration of decedents' estates "govern so far as they are applicable to like situations,"⁹⁵—it is clear such statements refer only to matters of procedure rather than of substance.⁹⁶

In matters of substance the California Supreme Court recognized that in guardianships the superior court sits as successors to the English chancellors and delegees of the king, as *parens patriae*, with broad powers to "zealously guard and scrupulously conserve the interests of the incompetent."⁹⁷ Thus, even more in a guardianship than in the case of a decedent, the court "may bring to its aid 'the full equitable and legal powers with which as a superior court is invested.'"⁹⁸ Those powers are very broad indeed.⁹⁹

One example of zeal in guarding the interests of an incompetent is *Estate of Harvey*.¹⁰⁰ The court refused to apply to a conservator the narrow view of incidental powers it had applied to an administrator in *McPike v. Superior Court*.¹⁰¹ Instead, the court held that

93. *Sullivan v. Dunne*, 198 Cal. 183, 189, 244 P. 343, 345 (1926).

94. *In re Bundy*, 44 Cal. App. 466, 468, 186 P. 811, 812 (1919).

95. CAL. PROB. CODE § 2100 (West 1981) (formerly CAL. PROB. CODE § 1606 (Deering 1931)): "When not otherwise specially prescribed in this division, practice and procedure and the making and entry of orders under this division shall be governed by the provisions of Division III of this code, so far as they are applicable." (derived from CAL. CIV. PROC. CODE § 1808 (Deering 1931)).

96. *Estate of Dunphy*, 158 Cal. 1, 3, 109 P. 627, 628 (1910).

97. *Sullivan v. Dunne*, 198 Cal. 183, 189-90, 244 P. 343, 345 (1926). See 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 314 (3d ed. 1945); 6 W. HOLDSWORTH, *supra*, at 648 (2d ed. 1937). Administration of decedents' estates, at least of personalty, has a different origin. "Probate matters belonged to ecclesiastical jurisdiction . . ." *In re Moore*, 72 Cal. 335, 340, 13 P. 880, 882 (1887). See also *Sohler v. Sohler*, 135 Cal. 323, 329, 67 P. 282, 284 (1902); *Toland v. Earl*, 129 Cal. 148, 151, 61 P. 914, 914-15 (1900).

98. *Guardianship of Cornaz*, 8 Cal. 2d 347, 359, 65 P.2d 784, 790 (1937).

99. Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention. . . . The principles of equity . . . are based upon a Divine morality and possess an inherent vitality and capacity of expansion, so as ever to meet the wants of a progressive civilization. *Times-Mirror Co. v. Superior Court*, 3 Cal. 2d 309, 331-32, 44 P.2d 547, 557-58 (1935).

100. 3 Cal. 3d 646, 477 P.2d 742, 91 Cal. Rptr. 510 (1970).

101. 220 Cal. 254, 30 P.2d 17 (1934); *supra* text accompanying note 83.

despite the absence of express statutory authority, the court, as an incident of its express authority to instruct the conservator, could authorize the conservator of an ailing elderly recluse to travel to Scotland to try to find relatives of the conservatee so that they could render advice regarding his future care.¹⁰²

Another example of zealous protection of incompetents can be derived from *Burge v. City & County of San Francisco*,¹⁰³ which held that the mother with whom a minor was living, rather than the father from whom she was divorced, had authority to compromise the minor's claim of damages for a personal injury. The issue revolved around the scope of the word *custody* in the applicable statute.¹⁰⁴ The court held: "Custody embraces the sum of parental rights with respect to the rearing of the child, including its care. It includes . . . the right to direct his activities and make decisions regarding his care and control, education, health and religion."¹⁰⁵

KEMP IN THE LIGHT OF CALIFORNIA HISTORY AND JUDICIAL PRECEDENT

Kemp can now be seen for what it is: a contrived opinion written to support a preconceived result rather than to provide a result which would conform to the law. It is a pastiche of errors, half-truths, unwarranted extrapolations, reliance on the irrelevant, and suppression of the relevant. The prior portions of this article provided some materials to show these statements are not simply brazen assertions intended to convince by substituting rhetoric for analysis. The balance of the article is what a pathologist might call a microscopic examination of *Kemp* to demonstrate its morbidity.

Kemp involved a "Guardian's Petition for Guidance and Instructions under the Chancery Powers of the Court in re Therapeutic Sterilization (Prob. Code 1400)."¹⁰⁶ Former Probate Code section 1400¹⁰⁷ was merely a definition of a guardian and a statement that the court could regulate him. The reference to section 1400 in connection with "chancery powers" in the caption of the petition

102. 3 Cal. 3d at 650, 477 P.2d at 744, 91 Cal. Rptr. at 512.

103. 41 Cal. 2d 608, 262 P.2d 6 (1953).

104. Now CAL PROB. CODE § 3500 (a)(2) (West 1981) giving the "parent having the care, custody, or control of the minor if the parents of the minor are living separate and apart" authority to compromise the claim.

105. 41 Cal. 2d at 617, 262 P.2d at 12.

106. 43 Cal. App. 3d at 760, 118 Cal. Rptr. at 65.

107. Quoted at length, *id.* at 761, 118 Cal. Rptr. at 66.

seems to be no more than the lifting of two sections of a California practice text which explained the phrase as a device developed in the absence of express authority for a guardian of a person, as distinguished from a guardian of an estate, to petition for instructions.¹⁰⁸ *Kemp* proceeded on the following bases:

[A]uthority for the questioned order, if it exists, must be found in the exercise by the probate court of its residual chancery powers under the provisions of Probate Code § 1400 . . . [But] the superior court sitting in probate . . . must look to express statutory authorization for its powers and procedure.¹⁰⁹

Section 1400 was, obviously enough, insufficient.

The first of *Kemp's* omissions of relevant authority was its failure to consider former Probate Code section 1500, the then applicable statute, which provided, as it had for many years: "Every guardian has the care and custody of the person of his ward. . . ."¹¹⁰ An easy speculation explains *Kemp's* suppression of section 1500. Section 1500 was derived from former Code of Civil Procedure section 1753 which provided that a guardian of a minor "is charged with the custody of the ward, and must look to his support, health and education."¹¹¹ When section 1753 was moved to the Probate Code, the reference to health was omitted. By *Kemp's* time however, custody, with regard to a parent, had been interpreted to comprehend health,¹¹² and it would have been hard to argue that a therapeutic, or a curative, sterilization was not within the meaning of health. Had *Kemp* tried to distinguish between the use of the word custody in the statutes relative to parents and those relative to guardians, and capitalized on the omission of the word health in the guardianship statute, and had *Kemp* relied on its own holding that express authority was required, a preposterous situation would have resulted—that a guardian not only had no duty to safeguard his ward's health but no authority to do so. A true *reductio ad absurdum*. Since both authority and common sense would have negated the conclusion to which *Kemp* was contrived

108. 3 N. CONDEE, PROBATE COURT PRACTICE §§ 2213, 2214 (3d ed. 1977). Reliance by counsel on Judge Condee's text can be inferred from the request for both "guidance and instruction," since the text discussed the appropriate label. 3 N. CONDEE, *supra*, at 405-06. Conservators and guardians of persons now have express authority to petition for instructions. CAL. PROB. CODE § 2359 (West 1981); 14 CAL. L. REVISION COMM'N REPORTS 543 (1978).

109. 43 Cal. App. 3d at 760-61, 118 Cal. Rptr. at 66.

110. 1961 Cal. Stat. ch. 608, at 1757, the version current when *Kemp* was decided.

111. 1907 Cal. Stat. ch. 943 (amending former CAL. CIV. PROC. CODE § 1753).

112. 41 Cal. 2d at 617, 262 P.2d at 12.

to come, the obvious way to eliminate the problem posed by section 1500 was to ignore it.¹¹³

Kemp continues with the portentous statement: "Under California Constitution (art. VI, sec. 5), superior courts have jurisdiction of all probate matters."¹¹⁴ As authority *Kemp* cited *Wood v. Roach* which stated: "By the Constitution of 1879 (art. VI, sec. 5), superior courts were given jurisdiction of all matters of probate in like manner as of cases at law or in equity."¹¹⁵ This was once true, and *Wood's* statement was made in a historical context. But *Kemp*, by changing the tense from past to present, transformed a correct statement of history into an erroneous statement of current fact, which exposes that *Kemp* was less than meticulous in its treatment of authority and cannot be read at face value. In reality, the constitution had been revised in 1928 to eliminate the specification of superior court jurisdiction in various types of civil matters. At the time of *Kemp*, the relevant section of the constitution was that adopted in 1966: "Superior courts have original jurisdiction in all causes except those given by statute to other trial courts."¹¹⁶ Thus *Kemp's* statement was an anachronism forty-two years behind the times. Again, one can only speculate as to why the statement was made. It may have been a mere error; or an effort to inflate the stature of the opinion by giving it a constitutional dimension; or a way to silently invoke the authority of the old cases that had to consider whether there were distinctions between probate and equitable jurisdiction.¹¹⁷

What seems likely is that the reference to the nonexistent constitutional jurisdiction was a disingenuous effort to dissemble the scope of the equitable powers that the Supreme Court had held to be incidental to probate jurisdiction. *Kemp* used two techniques of dissimulation: omission and overstatement.

To support the proposition that the "jurisdiction and powers [of the court in guardianships] are wholly statutory . . . [and the court] must look to express statutory authorization for its powers and

113. The question of interpretation was eliminated in 1979 by CAL PROB. CODE § 2353 (West 1981) providing in relevant part: "(a) . . . the guardian has the same right as a parent having legal custody of a child to give consent to medical treatment performed upon the ward and to require the ward to receive medical treatment." *Id.*

114. 43 Cal. App. 3d at 761, 118 Cal. Rptr. at 66.

115. 125 Cal. App. 631, 634, 14 P.2d 170, 171 (1932) (explaining *Burris v. Kennedy*, 108 Cal. 331, 41 P. 458 (1895); see *supra* text accompanying notes 56-62 & 70).

116. CAL. CONST. art. VI, § 10 (West Supp. 1985); compare *id.* art VI, § 5 (West 1954).

117. See *supra* text accompanying notes 60-69.

procedure,"¹¹⁸ *Kemp* cited *McPike v. Superior Court*.¹¹⁹ *McPike* does indeed say that in probate proceedings "the court has no other powers than those given by statute and such incidental powers as pertain to it."¹²⁰ *Kemp* ignored this reference to incidental powers and omitted any reference to the fact that only four years earlier, in a case involving a guardian's incidental authority, the Supreme Court had declined to accept an argument based on *McPike*.¹²¹

Kemp then confronted the very strong language in *Guardianship of Reynolds*:¹²² "Suffice it to say that in such matters [guardianships] our probate courts stand in the same position as the court of chancery, which court Blackstone described as being 'the supreme guardian and has superintendent jurisdiction over all the infants of the Kingdom.'"¹²³ *Reynolds* cited *Sullivan v. Dunne*¹²⁴ which said that although at common law guardianships had been "part of the general jurisdiction of the court of chancery . . . [s]uch proceedings in this state, however, are in *probate* [emphasis in original]."¹²⁵ The court in *Sullivan* further stated:

*Nevertheless . . . the Code of Civil Procedure, prescribing the methods to be followed in matters of guardianship of insane and incompetent persons and the powers of the courts in such proceedings, gives broad discretion, quite analogous to that vested in courts of chancery, to conserve the best interests of their wards (emphasis added).*¹²⁶

Kemp did not mention *Sullivan* and disposed of *Reynolds* with the bold assertion that "the probate court has no general equity jurisdiction."¹²⁷ The assertion was taken from *Security-First National Bank v. Superior Court*¹²⁸ and was made in the special context of collateral attack on a final judgment *in rem*.¹²⁹ Not only

118. 43 Cal. App. 3d at 761, 118 Cal. Rptr. at 66.

119. 220 Cal. 254, 30 P.2d 17 (1934).

120. 220 Cal. at 258, 30 P.2d at 18.

121. Estate of Harvey, 3 Cal. 3d 646, 477 P.2d 742, 91 Cal. Rptr. 510 (1970); see *supra* text accompanying notes 100-02.

122. 60 Cal. App. 2d 669, 141 P.2d 498 (1943) (affirming order that guardian allow grandparents to visit ward and to take ward for summer vacations).

123. 60 Cal. App. 2d at 673, 141 P.2d at 500.

124. 198 Cal. 183, 244 P. 343 (1926).

125. *Id.* at 189, 141 P. at 345.

126. *Id.* at 189, 244 P. at 345; see *supra* text accompanying notes 97 & 98.

127. 43 Cal. App. 3d at 762, 118 Cal. Rptr. at 67.

128. 1 Cal. 2d 749, 757, 37 P.2d 69, 73 (1934).

129. *Supra* text accompanying notes 67 & 69, and *supra* notes 77-81.

is the assertion unsupported in *Security-First*, it is followed almost immediately by the qualification: "[the probate court] has the power, however, to apply equitable and legal principles in aid of its functions as a probate court."¹³⁰ *Kemp*, of course, did not mention the Supreme Court's note that on its facts *Security-First* appears to have been impliedly overruled.¹³¹ Instead, *Kemp* underrated the scope of incidental powers by citing a case which, because the relevant statutes required a different distribution, denied the court authority to order payment of attorneys' fees from the corpus of a testamentary trust.¹³² The case is obviously irrelevant to the problem in *Kemp*—the incidental powers, not otherwise denied, that may be implied from a general grant of authority—the same sort of problem old Judge Coffey had stated so clearly and resolved so judiciously more than a century ago.¹³³

Kemp compounded its other errors by stating "[t]he probate court has exclusive jurisdiction of guardianship proceedings."¹³⁴ The statement was based on a case wherein the superior court in one county was not allowed to interfere in a guardianship proceeding already pending before the superior court in another county.¹³⁵ The reason for the statement was to fortify *Kemp*'s abridgment of the scope of incidental powers of the court in probate, or, in other words, to try to show that if a court sitting in probate did not have the authority, the court could not have it in any other capacity. *Kemp* did so by expanding a commonplace ruling on territorial comity to apply to prohibit the superior court in one county from exercising its probate and equity jurisdictions simultaneously. Furthermore, *Kemp* ignored language in *Schlyen v. Schlyen*,¹³⁶ a case cited by *Kemp*, which read "[probate] jurisdiction is not exclusive, depending on the facts of the particular case and may be waived."¹³⁷

130. 1 Cal. 2d at 757, 37 P.2d at 73.

131. Estate of Auslander, 53 Cal. 2d 615, 626 n.1, 349 P.2d 537, 542 n.1, 2 Cal. Rptr. 769, 774 n.1 (1960); see *supra* note 81.

132. 43 Cal. App. 3d at 762, 118 Cal. Rptr. at 67 (citing Estate of Muhammad, 16 Cal. App. 3d 726, 94 Cal. Rptr. 856 (1971) (2-1 opinion)).

133. *Supra* note 73 and accompanying text.

134. 43 Cal. App. 3d at 761, 118 Cal. Rptr. at 66.

135. Browne v. Superior Court, 16 Cal. 2d 593, 107 P.2d 1 (1940).

136. 43 Cal. 2d 361, 273 P.2d 897 (1954), cited in 43 Cal. App. 3d at 761, 118 Cal. Rptr. at 66.

137. 43 Cal. 2d at 378, 273 P.2d at 906.

[I]t is concluded: . . . (3) that when as here the issues pertain only to the rights of parties in privity with the estate and do not involve the rights of third parties or strangers to the estate the superior court sitting in probate has jurisdiction and should adjudicate them, but that such jurisdiction is not exclusive, depending on the facts of the particular case and may be waived

Id.

Schlyen conformed to the precedents,¹³⁸ and to pragmatic judicial administration:

Why should Judge Coffey, sitting in probate, be instructed by Judge Coffey, sitting in a case in equity brought for that purpose? If it is necessary or proper to appeal to a court of chancery, the probate court is such a court, and the proceeding is in fact for that purpose. It is the same court when sitting in matters of probate, and may exercise all equity powers necessary for complete administration.¹³⁹

Once uttered, *Kemp's* exaggerated implications derived from "exclusive jurisdiction" were more than merely repeated in *Guardianship of Tulley*.¹⁴⁰ *Tulley* articulates a proposition inherent in *Kemp* that the denial of authority to order sterilization "is not predicated on the eventuality whether the tribunal proceeds as a probate court or a court of general jurisdiction . . . [and cannot be based] on a mere inference deduced from the general principles of common law or the canons of equity jurisprudence."¹⁴¹

Based on *Sparkman v. McFarlin*,¹⁴² although the court knew it had been reversed,¹⁴³ *Tulley* held that "in the absence of specific statutory authority" no court could order sterilization of an incompetent.¹⁴⁴ Despite the breadth and explicitness of its holding, the court in *Tulley* thought it necessary to reiterate *Kemp*: "It is well established that the probate court has exclusive jurisdiction of guardianship."¹⁴⁵ *Tulley's* uncritical acceptance of *Kemp* is partial evidence of the truth of Justice Holmes' sad reflection: "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."¹⁴⁶

KEMP'S ABUSE AND SUPPRESSION OF OTHER PRECEDENTS

The denunciation of *Kemp* does not end with the specification of its abuses and misuses of California judicial precedents. Treatment

138. See *supra* text accompanying notes 71, 91 & 92, and *supra* note 64.

139. *Toland v. Earl*, 129 Cal. 148, 153, 61 P. 914, 915 (1900).

140. 83 Cal. App. 3d 698, 705, 146 Cal. Rptr. 266, 270 (1978).

141. 83 Cal. App. 3d at 704, 146 Cal. Rptr. at 270.

142. 552 F.2d 172 (7th Cir. 1977).

143. 83 Cal. App. 3d at 701-02, 146 Cal. Rptr. at 268. *Tulley* says the reversal was "on other grounds." But lack of statutory authority to order sterilization was not among any other grounds. "Because the court over which Judge Stump presides is one of general jurisdiction, neither the procedural errors he may have committed nor the lack of a specific statute authorizing his approval of the [sterilization] petition in question rendered him liable in damages for the consequences of his actions." *Stump v. Sparkman*, 435 U.S. 349, 359-60 (1978) (civil rights action against judge).

144. 83 Cal. App. 3d at 701, 146 Cal. Rptr. at 268.

145. 83 Cal. App. 3d at 705, 146 Cal. Rptr. at 270.

146. *Hyde v. United States*, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting).

of other authority in *Kemp* was equally unmeticulous. At one point the opinion defies explication if not description. The opinion refers to Welfare and Institutions Code section 7254¹⁴⁷ the then existent, but since repealed, eugenic sterilization statute.¹⁴⁸ The statute authorized sterilization of certain institutionalized incompetents, including those who showed “marked departures from normal mentality.”¹⁴⁹ The procedure for sterilization was initiated by the superintendent of the state hospital or state home, and after notice to the patient and his parents, spouse, children, and guardian, could be approved by the Director of Public Health. Judicial review of the Director’s decision to sterilize was not required unless one of the notified persons objected. The court in *Kemp* stated what seems clear: “This statute is not exclusive in that it applies only to persons previously committed to state mental hospitals.”¹⁵⁰ But then the court went on to say:

In view of the fact that the legislature has prescribed a comprehensive scheme requiring examination, notice, administrative hearings, administrative review, and judicial review, it may be concluded that the Legislature did not intend that sterilization of the mentally retarded was to be carried out without meeting the requirements imposed by this statute.¹⁵¹

So, within the space of two paragraphs, *Kemp* contradicted itself. In one paragraph the court said the statute is not exclusive and in the next paragraph it said that it is. *Kemp* may be forgiven for failing to realize that allowing sterilizations only of persons committed to state hospitals raised a serious question of underinclusion under the equal protection clause. That problem had not yet been recognized.¹⁵² But *Kemp* cannot be forgiven for double-talk.

Nor can the *Kemp* decision be forgiven for purporting to support its statement as to exclusivity by citing *Smith v. Wayne*,¹⁵³ which, *Kemp* said, involved “a similar Michigan statute” and held “[t]he

147. 43 Cal. App. 3d at 762-63, 118 Cal. Rptr. at 67.

148. The version in effect at the time of *Kemp* is 1971 Cal. Stat. ch. 1593, § 441, at 3371-72. See *Conservatorship of Valerie N.*, 40 Cal. 3d 143, 150-53, 707 P.2d 760, 764-65, 219 Cal. Rptr. 387, 390-92 (1985) (statutory history).

149. 1971 Cal. Stat. ch. 1593, § 441, at 3371.

150. 43 Cal. App. 3d at 763, 118 Cal. Rptr. at 67.

151. 43 Cal. App. 3d at 762-63, 118 Cal. Rptr. at 67.

152. *Ruby v. Massey*, 452 F. Supp. 361, 369 (D. Conn. 1978) (state must make procedure available for noninstitutionalized incompetents). But see *Guardianship of Tulley*, 83 Cal. App. 3d 698, 705, 146 Cal. Rptr. 266, 270 (1978) (assumption of propriety of making sterilization available only to institutionalized persons). *Tulley* was decided less than three months after *Ruby*, so the *Ruby* opinion may not have been available to the *Tulley* court.

153. 231 Mich. 409, 426-27, 204 N.W. 140, 146 (1925).

requirements of the statute . . . are jurisdictional, and no valid order can be made without substantial compliance with them."¹⁵⁴ The Michigan statute was similar to former Welfare and Institutions Code section 7254 only in that it related to eugenic sterilizations. But the Michigan statute was not limited to institutionalized persons and did not involve any administrative procedure; the statute related only to a proceeding initiated in court and terminated by a court order. The *Smith* court held that the statute was constitutional but that the order of sterilization had to be reversed because the lower court had not adhered to the required procedures.¹⁵⁵ *Smith* said nothing about exclusivity or about therapeutic, as distinguished from eugenic, sterilizations. The *Smith* case is so irrelevant to *Kemp* that to characterize the citation of *Smith* as another of *Kemp's* dissimulations does not seem too harsh.

The most significant authority cited in *Kemp* is *Wade v. Bethesda Hospital*,¹⁵⁶ which denied defendants' motion for summary judgment in a civil rights action against an Ohio judge for ordering a sterilization without express statutory authority. If *Kemp* committed any sin by citing *Wade*, it was pardonable because it involved a rather esoteric point of federal law. The question in *Wade* concerned the authority of the judge under the law of Ohio, but the court declined to follow Ohio law as declared in *In re Simpson*.¹⁵⁷ Instead, *Wade* based its decision on its interpretation of *Holmes v. Powers*,¹⁵⁸ a case involving only the law of Kentucky. To determine state law, a federal court must follow the decision of a lower state court "in the absence of more convincing evidence of what the state law is."¹⁵⁹ However, it has also been held that if there is no decision by the state's highest court, a federal court in nondiversity cases need only give "proper regard" to relevant rulings of other courts of the state."¹⁶⁰ In view of this uncertainty, *Kemp* cannot be faulted for ignoring the point.

154. 43 Cal. App. 3d at 763, 118 Cal. Rptr. at 67.

155. 231 Mich. at 425, 204 N.W. at 145.

156. 337 F. Supp. 671 (S.D. Ohio 1971), cited and discussed in 43 Cal. App. 3d at 764, 118 Cal. Rptr. at 68-69. *Wade* is said to have been settled for "a substantial sum of money." Burgdorf & Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995, 1016 n.154 (1977). Its viability as a current precedent since *Stump v. Sparkman*, 435 U.S. 349 (1978), is beyond the scope of this article.

157. 180 N.E.2d 206 (Ohio Probate Ct. 1962) (trial court opinion).

158. 439 S.W.2d 579 (Ky. Ct. App. 1968).

159. *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78 (1940).

160. *Commissioner v. Bosch*, 387 U.S. 456, 465 (1967). See HART & WECHSLER'S, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 708-09, 768-69 (P. Bator, P. Mishkin, D. Shapiro & H. Wechsler 2d ed. 1973).

Kemp, however, should be called to account for its own misleading interpretation of *Holmes v. Powers*. *Kemp* refers to *Holmes* by stating "[t]he appellate court affirmed the trial court's decision that such an operation [sterilization of an incompetent] could not legally be performed."¹⁶¹ In fact, the Kentucky court held that the petition to sterilize had been brought by the wrong parties and expressly declined to decide what it would have done had the case been brought by the proper party, a committee: "It may be (though we do not decide) that a legally constituted committee could exercise such a choice [to sterilize an incompetent], but there has been no inquest and there is no committee."¹⁶²

Less than a year after *Holmes*, in *Strunk v. Strunk*,¹⁶³ the Kentucky court confronted a case brought by a proper party. The Strunks had two sons, Tommy, 28, married, employed, and a part-time college student, and Jerry, 27, incompetent, with a mental age of six, and institutionalized. Tommy was suffering from a fatal kidney disease and needed a kidney transplant. No acceptable donor could be found except his brother Jerry, who was "highly acceptable." Their mother, as Jerry's committee, petitioned the county court for authority to use Jerry as the donor, and the county court granted her petition on the ground, among others, that Jerry's "well-being would be jeopardized more severely by the loss of his brother than by the removal of a kidney."¹⁶⁴ Jerry's guardian *ad litem* appealed first from the county court to the chancellor, who affirmed, and then to the Court of Appeals which affirmed the chancellor.

Strunk was relevant to *Kemp* not merely on the general ground that loss of a kidney, since it may be fatal if the remaining kidney fails, is a procedure at least as drastic as the loss of ability to procreate, but also on the particular ground that the Kentucky court considered what in California would have been called the relation between probate and equity jurisdiction:

In this state we have delegated substantial powers to committees of persons of unsound minds . . . and to county courts in their supervision. However, . . . these statutes were not intended to divest the equity courts of their inherent common law powers.

161. 43 Cal. App. 3d at 765 n.2, 118 Cal. Rptr. at 69 n.2.

162. 439 S.W.2d at 580. In California usage, a "committee" is a guardian or conservator.

163. 445 S.W.2d 145 (Ky. Ct. App. 1969).

164. *Id.* at 146.

These powers we have continued to exercise in spite of the jurisdiction granted to the county courts.¹⁶⁵

Nevertheless, *Kemp* does not mention *Strunk*. The omission cannot be excused: *Strunk* was not only cited to the *Kemp* court, the case was reprinted at length in the respondent's reply brief complete with annotations.¹⁶⁶ Thus, *Kemp's* suppression of *Strunk* can be viewed as an admission by silence of the inability to distinguish the cases. Considered with *Kemp's* other errors, such a view is not unduly derogatory.

A RATIONALE FOR *KEMP*

Without condoning the flagrant violations of proper judicial technique in *Kemp* and the uncritical acceptance of *Kemp* in *Tulley* and *Conservatorship of Nieto*, it is possible to explain the avidity with which the courts sought the results in those cases. The fallacies underlying the old eugenic sterilization statutes and the actual and possible abuses under them had been exposed about a half century before *Kemp*.¹⁶⁷ About a year and one-half before *Kemp* a particularly flagrant and notorious example of abuse arose: the case of the Relf sisters. Two Black children, aged 12 and 14, had been sterilized at the instance of functionaries of a federally funded family planning program in Alabama. The consent of their illiterate mother had been procured either by coercion or trickery. The purpose seems to have been to prevent the procreation of welfare clients.¹⁶⁸ Since the authority to sterilize incompetents was open to such harrowing abuse, it is easy

165. 445 S.W.2d at 148.

166. Respondent's Reply Brief at 23-27, Appendix H at 683-95. See Annot., 35 A.L.R.3d 692 (1971).

167. E.g., the dissenting opinion of Wiest, J., in *Smith v. Wayne*, 231 Mich. 409, 428, 204 N.W. 140, 146 (1925); *supra* text accompanying notes 153-55. See *Conservatorship of Valerie N.*, 40 Cal. 3d 143, 148, 707 P.2d 760, 762, 219 Cal. Rptr. 387, 389 (1985) ("the longstanding, but discredited, practice of eugenic sterilization"). See also *id.* at 148 n.4, 152 n.8, 156 n.16, 707 P.2d at 762 n.4, 765 n.8, 768 n.16, 219 Cal. Rptr. at 389 n.4, 392 n.8, 395 n.16 (collecting some of the literature both before and after *Kemp*). Burgdorf & Burgdorf, *supra* note 156 is the most cited article, but equally rewarding is Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values*, 81 COLUM. L. REV. 1418 (1981).

168. See *Newsweek*, July 16, 1973, at 31, col. 1.; *Time*, July 23, 1973, at 50, cols. 1-2; *Ebony*, Oct. 1973, at 150-52; *Nation*, Jan. 12, 1974, at 51-53. This list is merely illustrative, not definitive. See also *Quality of Health Care—Human Experimentation, 1973: Hearings on S. 2071, S. 2072 and H.R. 7724 Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare, 93rd Cong., 1st Sess. 1496-503* (statement of Jos. Levin, General Counsel, Southern Poverty Law Center, Montgomery, Alabama, accompanied by Mr. and Mrs. Relf); *Relf v. Weinberger*, 372 F. Supp. 1196 (D.C.D.C. 1974). The current restrictions on the use of federal funds to finance the sterilization of incompetents, 42 C.F.R. §§ 50.206, 441.254 (1985), are a response to the *Relf* case, 43 Fed. Reg. 52,146 (1978).

to see why *Kemp* and its progeny denied the authority to sterilize even though the procedure could be used for the benevolent purposes of preserving the mental or emotional health of an incompetent, or even preserving the incompetent's physical health short of creating "an unreasonable risk of death."¹⁶⁹ In those cases the courts were not mindful of Justice Story's admonition: "It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse."¹⁷⁰ The courts silently adopted "slippery slope" reasoning—they denied the authority because they feared that future courts would not act wisely.¹⁷¹ The vice of these cases is that they did not express—in *Kemp* actually suppressed and distorted—the available empirical data, including judicial authority, upon which they did and did not rely, and upon which the validity of the "slippery slope" argument depends.¹⁷²

THE HAZARDS OF *KEMP* AS A SUBMERGED DERELICT

Natural questions include what difference does any of the foregoing make? And why such an ado over historical materials? *Conversatorship of Nieto* is gone,¹⁷³ and *Kemp* and *Tulley* are inferentially overruled.¹⁷⁴ The trouble is that they are only *inferentially* overruled. Thus, some lawyer may find it expedient to argue they were overruled on other grounds,¹⁷⁵ that is, constitutional grounds rather than interpretive ones. On this premise counsel could argue further that *Kemp* and *Tulley* are still viable on their holdings that jurisdiction of the superior court in probate is so exclusive and statutorily limited that inferences should not be drawn as to the court's equitable or incidental powers.

Problems of interpretation may arise. The Probate Code has several references to the "medical treatment" of incompetents.¹⁷⁶ The code provides for the determination of the capacity of a conservatee as an adult to "give informed consent for medical treatment."¹⁷⁷ If the conservatee has been adjudicated to lack that

169. Cf. *Maxon v. Superior Court*, 135 Cal. App. 3d 626, 634, 185 Cal. Rptr. 516, 521 (1982); *supra* text accompanying note 24.

170. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344 (1816).

171. Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

172. *Id.* at 381-83.

173. *Supra* note 13.

174. *Supra* text following note 7.

175. Cf. *supra* note 132.

176. CAL. PROB. CODE, §§ 1880, 2353, 2355, 2357, 3200-3211 (West 1981).

177. *Id.* § 1880.

capacity, the conservator has exclusive authority to consent to medical treatment and to require the conservatee to receive such medical treatment whether or not the conservatee objects.¹⁷⁸ A guardian has similar authority to consent to "medical treatment" of his ward if the ward is under age 14.¹⁷⁹ The Probate Code authorizes the court to order medical treatment for an existing or continuing medical condition for children 14 or older and for conservatees not already adjudicated to lack capacity to give informed consent.¹⁸⁰ The petition for the order must state, among other matters, the predicted outcome of the recommended course of treatment.¹⁸¹ Additionally, the court may order the treatment only if it determines from the evidence all of the following:

(1) The existing or continuing medical condition of the ward or conservatee requires the recommended course of medical treatment.

(2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical health of the ward or conservatee.

(3) The ward or conservatee is unable to give an informed consent to the recommended course of treatment.¹⁸²

The code also authorizes the court to order the medical treatment of an adult who does not have a conservator.¹⁸³ The language of this grant of authority parallels that of the authority to order medical treatment of incompetents not already adjudicated to lack capacity to consent. Indeed, as to the need for a determination of danger to life or serious threat to physical health, the language is identical.¹⁸⁴

The denial of authority to order sterilization, which was applicable to all of the foregoing grants of authority,¹⁸⁵ was held unconstitutional in *Valerie N.*¹⁸⁶ The case did not require any definition of "medical treatment" as used in the Probate Code because sterilization is, obviously, a form of medical treatment. The statutory requirement of a threat to the "*physical* health of the ward or

178. *Id.* § 2355 (a).

179. *Id.* § 2353.

180. *Id.* § 2357.

181. *Id.* § 2357 (c)(4).

182. *Id.* § 2357 (h).

183. *Id.* §§ 3200, 3201.

184. *Id.* § 3208 (a).

185. *Id.* § 2356 (d).

186. *Conservatorship of Valerie N.*, 40 Cal. 3d 143, 160, 707 P.2d 760, 771-72, 219 Cal. Rptr. 387, 398-99 (1985); *supra* notes 2-3.

conservatee (emphasis added)"¹⁸⁷ is not mentioned in the opinion. But the term "habilitation" as used in the opinion is broad enough to include mental or emotional health.¹⁸⁸ The court clearly intended a broad application because the court stated that the conservators could elect to authorize an abortion as a "means of avoiding the severe psychological harm which assertedly would result from pregnancy" and, therefore, should not be denied "the one choice that may be best for her . . . contraception through sterilization."¹⁸⁹ This conclusion silently assumes that the limitation of treatment to promote physical, as distinguished from emotional or mental, health is inapplicable to therapeutic sterilizations. If this limitation is inapplicable to therapeutic sterilizations, why is it applicable to any other procedure that may correct a condition not dangerous to life but dangerous to emotional health, or to physical comfort, or to any condition adverse to the best interests of the incompetent, such as plastic surgery after gross disfigurement in a conflagration?¹⁹⁰ If the limitation is inapplicable, a situation similar to cases in which a conservatee adjudicated to lack the capacity to give informed consent arises, since the court may not order treatment without finding that the conservatee is unable to consent to the recommended treatment.¹⁹¹ When the conservatee has been adjudicated to lack capacity, the conservator's authority is not limited to considerations of danger to life, or the severity of the threat to health, or to consideration only of physical health.¹⁹²

But even if the limitation to danger to life or physical health is read out of the statute, the problem of interpreting "treatment" remains. Whether applicable or not, the very existence of the limitation to conditions endangering life or seriously threatening physical health shows a legislative usage, if not intent, that restricts treatment to life-prolonging medical management.

187. *Supra* text accompanying note 182.

188. *Supra* note 2.

189. 40 Cal. 3d at 160, 707 P.2d at 387, 219 Cal. Rptr. at 398.

190. *Cf. Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941) (parental consent required for plastic surgery on minor aged 15); *compare* CAL. PROB. CODE § 2353 (b) (West 1981) (requiring consent of both guardian and ward aged 14 or more, or a court order under *id.* § 2357).

191. *Supra* text accompanying note 182.

192. CAL. PROB. CODE § 2355 (a) (West 1981). The conservator, however, may not violate the conservatee's religious tenets that antedate the conservatorship, *id.* § 2355 (b), or place the conservatee in a mental institution involuntarily, subject the conservatee to experimental drugs or convulsive treatment, or treat in violation of the Natural Death Act ("living will"), *id.* § 2356.

Assume a ward or conservatee is not brain dead but is in a deeply comatose state and either cannot or is unlikely to recover, but is being kept alive on a support system. Assume further that the guardian or conservator, as the case may be, wishes to discontinue the treatment, and that most of the ward's or conservatee's relatives or family agree, but some relative disagrees. The guardian files a petition under the provisions for court-ordered medical treatment,¹⁹³ and the dissenting relatives intervene by filing a petition to require the guardian to "obtain and consent to, specified medical treatment."¹⁹⁴ The court may be willing to assume that the limitation to life endangering conditions and serious threats to physical health has been inferentially eliminated by *Valerie N.*,¹⁹⁵ but responds with an argument that in the total context of the statute "treatment" means treatment to sustain life, not to terminate life. Therefore, no statutory authority exists. Furthermore, since *Kemp* and *Tulley* were not expressly overruled, the court cannot resort to general principles of common law or the canons of equity jurisprudence.¹⁹⁶ What result? What this writer thinks the result should be is obvious. But what the courts, which tolerated *Kemp* for almost eleven years and then did not expressly overrule it, will do, this author does not have the temerity to predict.

Baron Surrebutter: A hard case but hard cases make bad law.

Crogate: I don't know what you mean by that, Mr. Judge, but I think bad law makes hard cases.¹⁹⁷

193. CAL PROB. CODE § 2357 (West 1981).

194. *Id.* § 2357 (i).

195. *Supra* text accompanying notes 186-92.

196. *Supra* text accompanying note 141, and *supra* note 99. But see 65 Op. Cal. Att'y Gen. 417 (1982), *disapproved* in *Dority v. Superior Court*, 145 Cal. App. 3d 273, 280 n.4, 193 Cal. Rptr. 288, 292 (1983) (without explanation).

197. Hayes, *Crogate's Case: A Dialogue in ye Shades on Special Pleading Reform*, in 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 417, 423 (3d ed. 1944). For the author see *id.*, at 414.